won, which could not be more or less than what it factually is or proves to be. But while this is probably true, could not the loss be either the loss of use of the amount of tribute for the period 1 April 1970 to 31 March 1971 or merely the reasonable interest due on this sum? In my view the damages could not be the actual loss of tribute or the reasonable interest that could accrue on this sum if paid but the loss of use. Lack of information of the probable amount of tribute for one year and of the use to which the plaintiffs would put the money to does not make for easy assessment. But I have no doubt that people of the plaintiffs' origin would make good use of any capital and doing the best I can, as I am enjoined to do in the circumstances, I would award $2,000 for damages for breach of contract. The plaintiffs will have the costs of the action.

I would conclude with first an apology for the delay in writing out this judgment and secondly a hope that hereafter there will be contractual peace between the parties.

Order accordingly

Solicitors: *Peh Swee Chin; Maxwell, Kenion, Cowdy & Jones.*

NAVARATNAM v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.)

October 2, 1972]

[Kuching — Federal Court Criminal Appeal No. 19 of 1971]

Penal Code, s. 409 — Criminal breach of trust — Proof of dishonest intention.

This was an appeal against the conviction of the appellant for criminal breach of trust. The question for consideration in the case was whether the appellant took the money with dishonest intention. He stated that he took the money to pay a lawyer who had been asked to act as defence counsel for the prisoner to whom the money belonged.

Held: in this case there was nothing in the prosecution evidence to dispute the truth of the appellant's statement that his intention in taking the money and keeping it in his flat was to pay the lawyer and therefore the conviction in this case was unreasonable and cannot be supported.

Cases referred to:-

(1) *Harakrishna Mahatab* v. *Emperor* A.I.R. 1930 Patna 209.

(2) *Mohamed Adil* v. *Public Prosecutor* [1967] 1 M.L.J. 151.

FEDERAL COURT.

Edgar Joseph Jr. (*S. Sahathevan* with him).

Denis Ong Jiew Fook (Deputy Public Prosecutor) for the respondent.

Ali F.J. ((read by Ismail Khan C.J.) delivering of the court): The appellant was tried on four charges of criminal breach of trust under section 409 of the Sarawak Penal Code, Cap. 7 and was convicted and sentenced on three of them. On the third charge he was acquitted on the ground that the prosecution failed to make out a *prima facie* case.

All the four charges in this case were in respect of cash belonging to Mohamed Zain bin Laji who, pending his trial on a charge of murder, was on remand in Sibu Prison. The appellant was the officer-in-charge of the prisons and in that capacity was said to have been entrusted with the prisoner's belongings for safe keeping.

The facts which are not in dispute are shortly as follows: On January 2, 1971 the police from the Anti-Corruption Agency, Sibu, Sarawak raided the Sibu Prison and discovered that a substantial amount of cash belonging to the remand prisoner missing from the office safe. Cash belonging to six other detainees were also found missing but no detailed evidence was given in respect of it and it was not suggested that the appellant had anything to do with it. Evidence against the appellant, however, was in respect of money which belonged to Mohamed Zain who, according to the evidence, had received various sums of money between July and December, 1970. These amounts were placed in six different envelopes, marked as Exhibits P1, P2, P3, P4, P5 and P6. They were all locked in the office safe for safe custody. Over $1,900 was found missing from the envelopes. The appellant being away on leave on the day of the raid did not have or was not given any opportunity to explain what happened to the missing cash. But on the day after the raid when he came to the office he told Assistant Superintendent of Police Poh Thuan Keat, the investigating officer, that the money was in his flat. Later the same day he handed over $1,700 to the police. On January 5, 1971 he handed another $300. On these facts the question for consideration would appear to be, whether the appellant took the money with dishonest intention. In terms of section 405 of the Penal Code, did he dishonestly misappropriate or convert to his own use the money which he took?

On the question of dishonest intention, we can do no better than quote a passage from the judgment of Fazl Ali J. in *Harakrishna Mahatab* v. *Emperor*.(1) We do so because the learned trial judge in the instant case has referred to it as having been cited with approval by Ismail Khan J. (as he then was) in the case of *Mohamed Adil* v. *Public Prosecutor*.(2) Fazl Ali J. said:

"It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not *mens rea* for the crime...."

In a long judgment covering several pages the learned trial judge dealt with all aspects of the evidence and arguments before him and gave his reasons for the finding that the appellant was guilty on the first, second and fourth charges. In convicting the appellant on the first and second charges, he said:

"I had carefully examined the evidence produced by the prosecution and had come to the conclusion that in so far as the evidence of Dunstan relating to the 1st and 2nd charges were concerned, there was no corroboration of his testimony. I

am fully aware of the danger of convicting an accused person, particularly a prisoner who is holding a senior position in the government service, on the uncorroborated evidence of an accomplice and had warned myself accordingly. This risk was ever present in my mind when considering the testimony of Dunstan. Notwithstanding the absence of corroboration, I was convinced absolutely that Dunstan was speaking the truth and felt safe in acting on his uncorroborated evidence, in respect of the 1st and 2nd charges."

Although Dunstan (PW9) seemed to know a great deal more he did not say very much with regard to the two sums respectively mentioned in the first and second charges. He said on November 7, 1970 the appellant took $600 from the envelope P1 and on November 17, 1970 he took another $300 from the envelope P2. On both occasions the appellant was alleged to have said that he was taking the money because his mother was sick in Kuala Lumpur hospital. Dunstan did not seem to know or did not wish to say anything with regard to the cash which was missing from the other four envelopes, P3, P4, P5 and P6. The evidence relating to the fourth charge was given by Abang Haji Kassim bin Abang Mohamed Jahar (PW12) which was also accepted by the trial judge. All that this witness said was that on December 12, 1970 he handed to the appellant $90.03 after having cashed a cheque for that amount. The fact that he did so was known to Dunstan who had made a note of it on the letter which authorised Abang Haji Kassim to cash the cheque.

As against the evidence of these two prosecution witnesses there was the statement by the appellant from the dock that he kept the money with him in order to pay a lawyer Mr. C T. Wong who had been asked to act as defence counsel for the prisoner Mohamed Zain. To understand the appellant's defence, it is necessary to refer to the evidence relating to the third charge on which he was acquitted. Here the evidence was that of the prisoner himself who said that he gave $600 odd to the appellant to enable him to engage a lawyer. Evidence was given of a letter dated 22 September 1970 — P15 — which was brought to the prison office together with the money by one Inspector Lekhi. The actual amount as stated in the letter was $606. In this letter it was stated that this amount was a collection from the prisoner's friends in the Police Field Force and that it was being sent to the prisoner in order to assist him in his forthcoming trial. Inasmuch as the money was given to the appellant by the prisoner himself, the learned trial judge must have found nothing on which he could infer dishonest intention. In the light of this evidence, a question arose at the trial whether, with regard to the other three charges on which the appellant was convicted, there was permission by the prisoner for the money to be used for the purpose of engaging a lawyer. We shall in due course consider this question. For the moment it is necessary to examine whether there was anything in the evidence of Dunstan or Abang Haji Kassim which could reasonably raise the inference that the appellant had dishonestly misappropriated the three sums.

It is quite clear that neither Dunstan nor Abang Haji Kassim had any knowledge as to what happened to the money which was taken by the appellant. The alleged statement by the appellant to Dunstan that he wanted the money for his sick mother was nothing more than a statement which, as shown by the evidence of ASP Poh, should not be taken seriously. This is so because the money apparently was still with the appellant and was not sent to his mother in Kuala Lumpur. We are, of course, referring to the $2,000 which the appellant handed to the police. Even if there was any doubt as to this, it must be resolved in favour of the defence. In any case, there was absolutely no evidence to show that the amount handed over was obtained from elsewhere in order to replace the prisoner's money. In terms thus stated, it is clear that neither Dunstan's nor Abang Haji Kassim's evidence could in any way support the appellant's conviction in this case.

With regard to the question whether there was permission for the appellant to use the three sums respectively mentioned in the first, second and fourth charges for the purpose of engaging a lawyer, there arose a controversy over the credibility of the prisoner as a witness. So much importance was attached to this question of permission that it became necessary for the prosecuting counsel to apply to the court for leave to treat the witness as hostile. He was so treated because when recalled by the defence he said in reply to a question that he gave the appellant permission to use the three sums for the purpose of engaging a lawyer. The learned trial judge, on being shown the police statement made by the witness, was satisfied that he had made contradictory statements and ruled that his evidence was "negligible". Unfortunately in this case the police statement was not marked as an Exhibit and did not, therefore, form part of the appeal record. We are, therefore, unable to know what was exactly said in the police statement. In his judgment the learned trial judge said that as far as the first, second and fourth charges were concerned, the prisoner's evidence was "negligible". Whatever that may mean, his finding seemed to be that the prisoner did not in fact give the appellant permission to use the three sums, $600, $300 and $90.03, for the purpose of engaging a lawyer. The point as it seemed to us is, if there was any truth in the appellant's statement of his intention to pay the lawyer, then his taking of the money did not become dishonest even if he did so without the prisoner's permission. None of the prosecution witnesses seems to know of the arrangement to engage a lawyer. ASP Poh was clearly not in a position to say whether or not there was such an arrangement. So was Abang Haji Kassim. It is possible that Dunstan knew something about it. He said in evidence that one day while escorting the prisoner to his cell he was asked about the $606 and that he told the prisoner to enquire from the appellant himself. It is possible that the prisoner might have told him what happened to the money. But Dunstan chose to say nothing about it, just as he chose to say nothing about the exercise book — D1 — which he had in his possession. The existence of this book came to light only when he was cross-examined by the defence counsel. With regard to this Dunstan said sometime in December, 1970 he was instructed by the appellant to enter in the book the total amount of money which had been taken by the appellant. Here again, even

if Dunstan knew the reason why the money was taken, he chose to say nothing about it. In the light of what we have just said, it is clear that there was nothing in the prosecution evidence to dispute the truth of the appellant's statement that his intention in taking the money and keeping it with him in his flat was to pay the lawyer. If we may say so, there was, on the contrary, some evidence to support the truth of his statement. There is, therefore, substance in the complaint that the conviction in this case was unreasonable and cannot be supported having regard to the evidence before the court.

In his judgment the learned trial judge has referred to the breach of Treasury regulations by the appellant. In his view the appellant committed the breach for having kept the money in his flat and not in the prison office safe as required by the regulations. We do not know how this can have any bearing on the question of dishonest intention. The truth is, the money in this case was the personal property of the prisoner and as such could be used by him in any way he wished. There was the evidence of Dunstan who said that the prisoner was given some money to use when he attended the preliminary enquiry at Binatang. There was also the evidence of the $606 which was given to the appellant in September, 1970 and in respect of which he has been acquitted. This amount was in the appellant's possession until he handed it to the police on January 3, 1971 and nothing was said about any breach of the Treasury regulations. We do not think we need say any more about this.

One last point which we wish to mention here is the view expressed by the learned trial judge with regard to the conduct of defence witness, Rama Das (DW1). He was called by the defence to give evidence to show that Dunstan was not worthy of credit. He stated on oath that he, while acting as the officer-in-charge of the prisons, had called upon Dunstan to account for the loss of $10 which belonged to another prisoner named Matthew Langei. Threatened with disciplinary action, Dunstan had refunded the amount. The trial judge rejected this evidence on the ground that the witness being a friend of the appellant was an interested witness. Not only that, the trial judge also said that Dunstan has received "a raw deal at the hands of acting Superintendent of Prisons, Rama Das." and was strongly of the opinion that the matter should be further investigated by the Government. We can find no basis for this view. Unless there is clear evidence to show that a witness at the trial is interfering in the proper administration of justice, trial judges should refrain from expressing opinion or making recommendations as in this case.

For the reasons already stated, we would allow this appeal, quash the conviction and set aside the sentence. Fines, if paid, are to be refunded.

Appeal allowed.

Solicitors: *Battenberg & Talma.*

LIM CHOW KENG v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ong Hock Sim F.J. and Syed Othman J.) December 8, 1972]

[Kuala Lumpur — Federal Court Criminal Reference No. 3 of 1972]

Criminal Law and Procedure — Appeal against conviction and sentence — Appeal against sentence not pursued — Appellate court enhancing sentence in revision — No opportunity given to appellant to show cause — Criminal Procedure Code (F.M.S. Cap. 6), s. 325(ii).

In this case the applicant had appealed to the High Court against conviction and sentence. He did not however pursue the appeal against sentence. The learned judge acting in revision enhanced the sentence. Subsequently the learned judge reserved for the Federal Court the following question of law: "Whether having regard to the provisions of section 325(ii) of the Criminal Procedure Code (F.M.S. Cap. 6) the High Court may enhance sentence without giving a convicted person notice of his intention to do so or without an opportunity being given to show cause why the sentence should not be enhanced".

Held: in the circumstances as the convicted person had not been given an opportunity to be heard before the order to his prejudice was made, the answer to the reference should be in the negative. The High Court should not exercise the power to enhance the sentence without giving the convicted person notice of its intention to do so or without an opportunity being given to show cause why the sentence should not be enhanced.

Case referred to:-

(1) *In re Chunbidya & Ors.* (1934-1935) L.R. 62 I.A. 36.

FEDERAL COURT.

Datuk S. P. Seenivasagam for the appellant.

Shaik Daud bin Haji Mohamad Ismail (Deputy Public Prosecutor) for the respondent.

Azmi L.P.: The applicant was convicted in the Sessions Court of having corruptly accepted for himself from a certain person a gratification of a sum of $1,000 as a reward for forbearing to take action against another person for an alleged offence of using a vehicle whilst carrying goods weighing in excess of the permitted weight, an offence punishable under section 4(a) of the Prevention of Corruption Act of 1961 and was sentenced to a term of imprisonment of 6 months and to a fine of $1,000 and also ordered to pay $500 to the complainant.

The applicant appealed to the High Court against the conviction, sentence and the order to pay the compensation.

In his petition of appeal he stated in reference to the sentence in the following terms: —

"(9) The sentence is manifestly excessive having regard to your petitioner's record of service, character and antecedents."

For some reasons not apparent from reading the record of appeal nothing was mentioned by both counsel for the applicant and the learned Deputy Public Prosecutor as to the sentence passed on the applicant. The learned judge after hearing counsel's arguments reserved his judgment and on a subsequent date in a written judgment dismissed the appeal against conviction and in reference to the sentence stated as follows (We are going to quote only the relevant parts of the paragraph): —

"The appeal against sentence was not pursued although on record the appellant had appealed against both conviction